

**MEMORANDUM OF UNDERSTANDING BETWEEN THE
U.S. DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION AND
THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY FOR WATER
EXCHANGE IN THE YAKIMA BASIN**

PARTIES

This Memorandum of Understanding (MOU) is entered into between the State of Washington (State), acting through the Department of Ecology (Ecology) and the U.S. Department of the Interior Bureau of Reclamation (Reclamation).

INTRODUCTION AND HISTORY

In 1945 the Federal District Court for the Eastern District of Washington approved a consent Judgment providing for Reclamation to facilitate diversion of water from the Mainstem Yakima and Naches Rivers to enumerated parties from storage, return flows, natural flows and other sources, denominated as the Total Water Supply Available (TWSA) , according to parties' status as pro-ratable or non-proratable. All parties to the Consent Decree have water rights of May 10, 1905 or earlier priority.

In 1989, anticipating passage of federal legislation pertaining to water conservation in the Yakima basin, the Washington Legislature enacted Chapter 90.38 RCW, authorizing the Yakima Basin Trust Water Rights Program. The legislature recognized that the interests of the state would be served by developing programs, in cooperation with the United States and the various water users in the basin, that increase the overall ability to manage basin waters in order to better satisfy both present and future water needs.

In 1994, Congress authorized Phase II of Title XII , Yakima River Basin Water Enhancement Project of 1994, P.L. 103-434, (YRBWEP). Ecology and Reclamation have worked together for more than a decade to jointly identify and fund various conservation projects and water right acquisitions that advance the goals and objectives of Title XII. The adjudication of Yakima basin surface water rights initiated in 1977 is progressing towards conclusion. The Court has adjudicated thousands of claims to surface water rights in the Yakima basin and conditionally determined the extent and validity of those rights. Further, the relative priority of surface water rights have also been conditionally determined.

In 2001, the Roza Irrigation District (Roza) first sought curtailment in *Ecology v. Acquavella* of junior users to protect "proratable" water users, like Roza, who rely on May 10, 1905 rights that are based on Reclamation's initiation of the Yakima Irrigation Project. The court entered an order only for the year 2001 curtailing the use of water by certain water right holders with a priority date later than May 10, 1905 ("junior" rights).

In 2003, the legislature enacted amendments to Chapter 90.42 RCW authorizing Ecology to use the trust water right program for water banking in the Yakima basin. These amendments acknowledge the need for Ecology to manage water rights within the trust water rights program for a variety of objectives associated with transfers of existing water rights and future water uses. The purposes identified for the water bank were:

“To mitigate for water resource impacts, future water supply needs, or any beneficial use under chapter [90.03](#), [90.44](#), or [90.54](#) RCW, consistent with any terms and conditions established by the transferor, except that return flows from water rights authorized in whole or in part for any purpose shall remain available as part of the Yakima basin's total water supply available and to satisfy existing rights for other downstream uses and users...”

In 2004, a year of mild shortage, a call for curtailment of post May 10, 1905 rights was renewed with the court. An order in *Ecology v. Acquavella* curtailing certain junior rights was entered on June 10, 2004. This order did not provide an exception for in-house domestic water use. This order superseded the earlier 2001 order. On March 11, 2005, the adjudication court issued an amended order that remains in effect. The March 11, 2005 Order Limiting Post-1905 Diversions provides that when Reclamation imposes prorationing among May 10, 1905 rights, certain identified post-May 10, 1905 water users are immediately curtailed. The curtailment of the junior rights remains in effect until prorationing among May 10, 1905 rights ends.

The City of Roslyn filed a motion on November 10, 2004 seeking an exemption from the above orders for its indoor domestic use. On August 24, 2005, the Court Commissioner in *Acquavella* issued its Memorandum Opinion Re: City of Roslyn's Motion to Revise Order Limiting Post-1905 Diversions During Periods of Water Shortage.

The senior water right acquisitions and proposed transfers generally lead to changes in point of diversion, place of use, or season of use. Changes in point of diversion and purpose or season of use can impact project operations by changing the location where a call for water occurs along the Yakima River or its tributaries, where return flows find their way back to the natural river course, and in the case of domestic or municipal supplies, when the call for water may occur. In a severe case, the transfers could cause impairment to pro-ratable users by reducing the TWSA. If water is to be transferred downstream a significant distance, the transfer can favorably affect project operations for instream flow improvements. Water transferred upstream for use depletes the river reach between the two points of diversion and can reduce operational flexibility by leaving a gap in flows which can, if necessary, be mitigated through drafts of storage water.

Certain existing users, especially in the upper basin, find their water rights to be inadequate. Others seek water rights, through transfer, for new uses. In both cases, these users may be at continued risk of curtailment of their junior or transferred senior water rights, without the use of Reclamation storage facilities.

Reclamation and Ecology desire to implement a water exchange program to provide a potential solution for these water needs without impacting the TWSA-based rights.

PURPOSE, OBJECTIVE AND SCOPE

Ecology and Reclamation intend to use their best efforts to work collaboratively and in good faith to pursue and implement a program for water banking or exchange that requires the use of Reclamation storage facilities and the delivery of water under subsequent permits between Ecology and identified third-party water users.¹ This program may also address the issues raised in the above referenced Orders and Memorandum Opinions with the goal of seeking to find water for certain junior water right holders with post-1905 priorities, without impairing the water rights or other rights of other parties.

This MOU outlines the relationship between Reclamation and Ecology for the water exchange process. This voluntary intergovernmental MOU is not a contract.

This MOU applies to the Yakima River and its tributaries upstream from Wanawish Dam outside of the Yakama Reservation.

This document is for internal use only by the Department of Ecology and the Bureau of Reclamation. It does not seek to alter or amend rights or procedures available to members of the public. Nothing herein affects Ecology's duties under existing law to review each application for the transfer of a right either into the state trust program or out of the trust program so as to insure that the transfer does not impair the water rights of any party. Nothing herein affects Reclamation's duties under applicable law.

DEFINITIONS

“Assigns” means to designate for purposes of storage or release of trust water rights pursuant to this MOU and related contracts.

“Permit” means an approval by the Department of Ecology authorizing the beneficial use of public waters under Chapters 90.03 or 90.44 RCW. The permit may be consolidated

¹ The Reclamation Project Act of 1939, (53 Stat. 1187.) See also, Section 1203(i)(2) of Title XII (YRBWEP): “The Secretary shall, to the maximum extent possible under applicable Federal, State, and tribal law, cooperate with the State of Washington to facilitate water and water right transfers, water banking, dry year options, the sale and leasing of water, and other innovative allocation tools used to maximize the utility of existing Yakima River basin water supplies.”

In addition to many sections of RCW 90.38 and 90.42., section RCW 90.42.100 states: “(1)The Department is hereby authorized to use the trust water rights program in the Yakima river basin for water banking purposes.

with the Department of Ecology's approval for a change to or transfer of an existing water right.

"Source" means an aquifer or surface water body, including a stream, stream system, lake, or reservoir and any spring water or underground water that is part of or tributary to the surface water body or aquifer, that the Department of Ecology determines to be an independent water body for the purposes of water right administration. (WAC 173-152-020(5)).

"Value" means the amount of water calculated for "source availability matching" as described further in paragraph 7, of the "Water Exchange Management" section, below.

PROCESS

1. Ecology identifies the type and location of participants (junior water users) and quantifies their water demand;
2. If the senior right is acquired from an individual or entity, Ecology negotiates the conditions of the trust water right prior to placement of the water right into the Trust Water Program (TWP);
3. Ecology acquires senior water rights;
4. Ecology issues appropriate instruments associated with the trust water right.

Ecology and Reclamation may then execute a contract (or similar instrument) to implement the following general procedures:

5. Ecology identifies and assigns the trust water rights to the United States as part of a bargained-for exchange for the use of storage and a water service contract.
6. Reclamation will provide a water service contract to Ecology for quantities of stored water commensurate with the calculated value of the trust water rights assigned to the United States.
7. Concurrently, Ecology issues a permit to the designated water user as a state action.
8. Reclamation makes water available to Ecology for further permitting to the water users. Reclamation is not a party to, nor bound by, the Ecology issued permits or any other agreements between Ecology and the water user under this MOU except to store and release water pursuant to contracts executed between Reclamation and Ecology. (See below.)
9. Ecology will not assign trust water rights to Reclamation nor will Reclamation accept any water rights or issue a water service contract if any senior water right holder in *Acquavella* has its water or other rights impaired or diminished, directly or indirectly.
10. Prohibited "impairment" should include, but not be limited to, any action that has the effect of increasing the consumptive use of any water right or impairing or reducing the Total Water Supply Available (TWSA) and/or undertaking or approving any other action that will have a localized impact on streams or river reaches, which would impair the Yakama Nation's instream water right for fish or other aquatic life by reducing available fish habitat even if such action does not otherwise increase consumptive use of water or reduce TWSA.

PRIORITIES

This program may assist junior domestic and municipal users who require full-year use of reliable water without reducing Reclamation's ability to manage, deliver and protect project water. Because of the relatively small amounts of water required, and pending *Acquavella* special considerations, the initial efforts of this program will focus first on these junior domestic and municipal users. Subsequent efforts may include other water users.

WATER EXCHANGE MANAGEMENT

1. Ownership: Pursuant to the intended storage and water service contract between Reclamation and Ecology, the water right will be assigned to the United States to be stored on behalf of the Washington State Department of Ecology.
2. Delivery: The trust water assigned to Reclamation will maintain its elements, including priority date. Reclamation will provide a water service contract to Ecology for further permitting by Ecology to identified exchange program water users while ensuring flexibility, discretion, and protection of all river operations, maintenance and safety needs, and non-program water users and water right holders.

The maximum amount of water to be delivered will be limited to the consumptive amount of water associated with the trust water right exchanged for a contract, less any amount required by condition VI.3 to demonstrate substantial environmental benefit/fisheries benefit.

Further, that amount will be limited to:

- The amount of water available at the original point of diversion of the trust water right assigned to Reclamation;

and,

- The amount of otherwise unused storage capacity in project reservoirs that is available to store water and assigned to Reclamation. The amount would be calculated on a month-to-month basis during the irrigation season and would identify a volume of stored water at the end of the irrigation season available for use until the beginning of the subsequent irrigation season. In determining the amount of unused storage capacity, Reclamation will consider recommendations from SOAC and the Water Transfer Working Group or other water right holders that the stored water be retained in storage, so as not to use any water needed as carryover for existing rights and for use for fish and other aquatic life during the winter and next irrigation season ;

3. Substantial Environmental Benefit/ Fisheries benefit: Ecology will ensure that a transfer will not be prioritized under the Hillis Rule (WAC 173-152) unless there is an instream benefit to the Yakima River basin consistent with the purposes of YRBWEP

and the Yakama Nation's Treaty water right for fish and other rights. This objective applies to all water rights placed into the trust water program for the purpose described in this MOU.

The instream benefits may be demonstrated in one of two ways:

- a. Ecology acquires the water right(s) from a priority tributary stream identified by the State's water acquisition program or YRBWEP with the net result that instream flow is improved in that stream; or,
- b. For rights acquired on the main-stem Yakima River, Ecology reserves from the conveyance to the United States a one-third share of that acquired water, to be delivered instream to benefit the Yakima River below Parker if consistent with the other provisions of this MOU.
- c. As an Alternative to b, a water user not wishing to reserve one-third of the water right for instream flow purposes, may submit their proposal to Ecology and demonstrate the benefits and impacts to the natural environment. Ecology will review the proposal and consult with the Yakama Nation and the Washington Department of Fish and Wildlife to determine if the applications associated with the proposal can receive expedited processing.

4. Costs: Reclamation will require Ecology to advance funds for its proportionate share of project construction and O & M costs annually. Ecology may allocate proportionate shares of project costs in the price of program water to be charged to the users.

5. Non-Impairment:

- a. Ecology will include in each permit a provision stating that where the user agrees that valid priority calls against the source trust water right, based on local limitations in availability, may result in temporary curtailment of the use of water under the permit until the priority call for water ends.
- b. Ecology and Reclamation agree that implementation of this MOU or execution of any subsequent permits pursuant to this MOU shall not cause detriment or injury to the rights of existing water users or otherwise be inconsistent with this MOU.
- c. The parties intend to continue full use of the Water Transfer Working Group (WTWG) to examine each acquisition and permit for all water rights transferred or changed under this MOU and subsequent contracts. Ecology will perform an impairment analysis consistent with current procedures for transfers and changes to water rights.

6. Non-use and Reallocation: Where the water user does not beneficially use the water identified and deliverable under this program for its permitted use, Ecology may reallocate that water to another user. Water authorized by permits and water right changes or transfers under this program must be used beneficially and speculation is prohibited. If proposed for purposes other than domestic or municipal water supply purposes, infrastructure must be installed as required by the schedule in Ecology's permit or water right change authorization approving the use. For domestic or municipal purposes, the use must be identified in a water system plan if one is required pursuant to Chapters 246-

290 and/or 246-293 WAC and infrastructure must be installed as required by the schedule in Ecology's permit or water right change authorization.

7. Source availability matching:

a. Ecology will maintain an inventory and account of exchange program water rights and their associated permits. Reclamation and Ecology will jointly monitor the performance of this program.

b. Ecology will use generally accepted techniques for calculating the consumptive use and normal return flow characteristics associated with each acquired trust water right. Depending on the circumstances, the consumptive use amount can be a single value expressed as acre-feet per year, or could vary seasonally and be expressed in acre-feet per month, or for short duration could be a single year or single month values based on climate for that period.

c. Permits issued by Ecology will be conditioned to ensure that the quantity of water allowed does not exceed that amount of water available under the acquired trust water right (see POL-1022) and the availability of unused storage capacity to retain the trust water right for later release.

8. NEPA/SEPA Compliance: Reclamation and Ecology agree that contracts entered into pursuant to this MOU will be both Federal and State actions. Further, Reclamation and Ecology agree that permits between Ecology and water users will be State actions. Each agency will be responsible for their respective environmental compliance requirements.

GENERAL PROVISIONS

1. Nothing in this agreement expands, alters or limits the property or other rights, authority, responsibilities, sovereignty, or jurisdiction of any party. Nothing herein shall act to waive, abrogate, define or diminish the Treaty rights of the Yakama Nation nor the sovereign rights of the State of Washington, the Yakama Nation or the United States.

2. Notwithstanding any other provision of this MOU, the parties acknowledge that Reclamation's actions are subject to federal reclamation law, as amended and supplemented, and the policies, rules and regulations promulgated by the Secretary of the Interior under federal reclamation law; and applicable federal law, including but not limited to, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).

3. Notwithstanding any other provision of this MOU, the parties acknowledge that any contract executed under this MOU where Project benefits are afforded shall be subject to federal reclamation law, policies, and rules and regulations governing recovery of Project costs. The parties further acknowledge that the costs of development, review and approval of proposed actions, including but not limited to, environmental compliance

activities preparation, negotiation and execution of contracts, and any other costs of mitigation determined to be required, shall be incurred by Ecology . Any contract executed under this MOU that implements a joint federal and state program, as authorized and directed by federal law and funded through federal appropriations, shall be subject to federal cost sharing laws, policies and practices.

4. Nothing in this MOU is intended to create any right in any entity not a party to this MOU nor shall any entity be considered a third party beneficiary to this MOU. This MOU is not intended to bind or affect any non-signatory party, and the failure of any non-signatory party to object to any provision of this MOU cannot be viewed as waiving, affecting, or prejudicing any non-signatory party's rights, factual arguments, legal arguments or legal positions.

5. This MOU constitutes the entire MOU between and among the parties with respect to the subject matter of this MOU. Any modification of this MOU must be made in writing and agreed to by all the parties.

6. All actions called for by this MOU are subject to and contingent upon the availability and allocation of future federal and state appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals as needed.

AMENDMENT AND SEVERABILITY

Ecology and Reclamation enter into and continue this MOU voluntarily and in good faith. This MOU shall be effective upon the signatures of the officials listed below. This agreement may be amended or supplemented at any time by mutual consent of the parties. This MOU is severable from any contracts that are entered into pursuant to this MOU.

TERMINATION OF MEMORANDUM

This MOU is intended to have an indefinite term but may terminate upon the following conditions or events:

- a. Where this agreement creates a financial detriment to the United States and upon written notice of such detriment by Reclamation, or
- b. Upon written notice by either Reclamation or Ecology.

SIGNATURES

J. William McDonald, Regional Director
Pacific Northwest Region, Bureau of Reclamation

DATE

Jay Manning, Director,
State of Washington Department of Ecology

DATE